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IN THE

Supreme Court of the United States.

OCTOBER TERM 1957.

No. 598.

W. D. GREENSHIELDS, JULIUS LIVINGSTON AND LIVINGSTON OIL COMPANY, A CORPORATION,
Petitioners,

v.

WARREN PETROLEUM CORPORATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF RESPONDENTS.

Background.

The Ringwood Field in Major County, Oklahoma, was discovered in 1946 (Tr. Vol. I, p. 171). By January 1951 there were 175 wells in the field (Tr. Vol. I, p. 173). There was no market for gas produced with the oil; great quantities of gas were being vented to the air, and the Oklahoma Corporation Commission was considering shutting down the wells to prevent waste (Tr. Vol. I, pp. 172; 217; Vol. II, p. 281). The producers contacted a number of companies other than Respondents Warren and Oklahoma Natural relative to their construction of a gasoline plant to process

this waste gas but none were interested (Tr. Vol. II, pp. 281-2). Finally in 1951, Warren and Oklahoma Natural agreed to build a plant and entered into Gas Purchase Contracts with all producers in the field (Tr. Vol. I, p. 28; Vol. II, pp. 282-3; 399) except Respondents Great Western Producers, Inc., and Great Western Drilling Company. Two years later the Great Western companies executed gas contracts covering only one zone and a limited area (Tr. Vol. II, pp. 277-8; 402). In 1952 Warren and Oklahoma Natural commenced processing gas from the field utilizing a gathering system, compressors and gasoline plant which they had constructed or installed at a cost of $5.5 million (Tr. Vol. II, pp. 379; 385; 387). Such operations permitted the conservation of 45 billion cubic feet of gas that would otherwise have been wasted (Tr. Vol. II, pp. 357; 381; 385). The gas reserves will probably be exhausted before Warren and Oklahoma Natural's investment is paid out (Tr. Vol. I, p. 237).

Greenshields, one of the royalty owners in the Ringwood Field, brought this action in the District Court of Major County, Oklahoma attacking Warren and Oklahoma Natural's gas purchase contracts. He had previously failed in a proceeding before the Oklahoma Corporation Commission to have a minimum gas price of 10¢ per MCF established for the field (Tr. Vol. I, p. 85). After removal of the case to the United States District Court for the Western District of Oklahoma, Livingston crossclaimed against Warren and Oklahoma Natural attacking the gas contracts in his own right (Tr. Vol. I, p. 94). At the trial no effort was made to establish any conspiracy and the case was tried as a breach of contract suit. The District Court entered a judgment against Greenshields and Livingston which was affirmed by the Court of Appeals. By their Petition for Writ of Certiorari Petitioners challenge the jurisdiction of the United States District Court in the first instance.

Statement of the Case in Relation to Removability and Opinion of the Court of Appeals.

Greenshields' State Court Petition names as defendants a number of producers in the Ringwood Field in addition to Warren and Oklahoma Natural. Diversity of citizenship between Greenshields and all of the defendants does not exist. Therefore, removability is to be determined by paragraph "(c)" of 62 Stat. 937 (1948), 28 U. S. C. § 1441, which reads:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

The Court of Appeals for the Tenth Circuit held that the following allegations in Greenshields' State Court Petition stated a separate and independent claim or cause of action against Great Western Drilling Company and Great Western Producers, Inc., both of whom were Texas corporations (Tr. Vol. I, p. 46):

> "9. * * * [Drilling has ceased and drainage has occurred] all because of the unconscionable, confiscatory and unreasonable 'Gas Purchase Contracts' entered by the 'defendant lessees' and 'Plant Operators' all as will be hereinafter more particularly set out.
>
> * * *
>
> "11. That in late 1950 or early 1951 Warren Petroleum Corporation and Oklahoma Natural Gas Company, corporations, defendants herein entered 'Gas Purchase Contracts' with all the different 'lessee defendants' in the Ringwood Field, *with the exception*

of two who will be hereinafter mentioned.[1] * * * [That the 'Gas Purchase Contracts' were executed and entered by all the] 'lessee defendants' *except by the defendants Great Western Producers, Inc. and Great Western Drilling Company, a corporation, who have since entered the contract, however, with certain modifications as to producing zones committed under the same. That with this one exception*[1] all of the lessees entered exact contracts and thus committed the sale of all their gas in the Ringwood Field. * * *

* * *

"17. That the 'Gas Purchase Contracts' as have been entered by the defendant lessees are unconscionable, confiscatory, unreasonable and are an attempt to alienate valuable property rights from this plaintiff. . . . That the contract was a connivance, collusion, and confederation between the plant operators, Warren Petroleum Corporation and Oklahoma Natural Gas Company and all the 'lessee defendants' who signed the agreement. . . ." (Pet. App. p. v)

The significance of these allegations is explained in the following excerpt from the Opinion:

"Since the acts of the Great Western interests are alleged to have transpired at a different time than those of the other lessee defendants and are further asserted to have consummated in a different result, *the pleader has negatived the participation of Great Western in the principal conspiracy of which he complains.*[2] The contracts signed by Great Western cover a less extensive gas zone than those executed by any of the other defendants. The harm alleged to have been suffered by plaintiff and 'all others similarly situated' by the execution of the gas purchase contracts cannot, by the original state court pleading, be attributable to Great Western. The claim made against Great Western by

1. Emphasis added by Court of Appeals.
2. All emphasis added except where otherwise noted.

plaintiff arises from subsequent and different acts occasioning different results. It is a 'separate and independent claim' within the bounds of Sec. 1441(c) and as such permits removal to federal jurisdiction. The trial court properly granted the petitions of Great Western Drilling Company and Great Western Producers, Inc. for removal from the Oklahoma State Court." (Pet. App. pp. v-vi)

Question to Be Decided.

Is there a conflict between the decision of the Court of Appeals in this case and the holding of this Court in *American Fire & Casualty Company v. Finn*, 341 U. S. 6 (1951), the decisions of other circuits involving the same question or the decisions of the Supreme Court of Oklahoma such as to require this Court to exercise its supervisory powers and take jurisdiction of this case?

Reasons for Denying the Writ.

There is no such conflict between the Opinion of the Court of Appeals, the holding of this Court in the FINN case, the decisions of other circuits involving the same question or the decisions of the Supreme Court of Oklahoma as to require this Court to exercise its supervisory powers and take jurisdiction of this case.

Petitioners assume that the State Court Petition alleges a *continuing conspiracy involving all the defendants* including the Great Western companies and argue that therefore no separate and independent claim or cause of action is alleged. The argument begs the question. If the State Court Petition in fact alleged but a single conspiracy involving all of the defendants obviously—and by definition—there could be no separate and independent claim within the meaning of the removal statute. That, however, was the question the lower courts had to determine.

It is apparent from the quoted allegations from the State Court Petition that Greenshields alleged two separate wrongs. The first involved the execution of Gas Purchase Contracts by all gas producers except the Great Western Companies which covered *all gas* produced from every zone from *all leases* located in a four-township area; the second involved only the contracts of the Great Western companies executed at a much later date and specifically limited to gas produced from a single zone from a single lease. This second wrong was clearly a separate and independent claim or cause of action justifying removal of the entire case under 28 USC § 1441(c).[3] The Great Western companies could not have been parties to the original wrong. They refused to execute the gas contracts until they were limited to cover only the gas produced from the Manning Zone, and then only after the first proceeding before the Oklahoma Corporation Commission had denied them relief. The Court of Appeals properly construed the quoted portion of the petition as a negation[4] of Great Western's participa-

3. Removal can also be justified on the following basis: The allegations of conspiracy in Greenshields' State Court Petition are mere conclusions of law negatived by the *facts* therein alleged. *Sewell v. J. E. Crosbie, Inc.*, 127 F. 2d 599 (CCA 8, 1942), cert. den. 317 U. S. 643, 65 S. Ct. 36, 87 L. Ed. 518 (1942); *Hamilton v. Empire Gas & Fuel Co.*, 297 Fed. 422 (CCA 8, 1924); *First National Bank of Greeley v. United States*, 86 F. 2d 938 (CCA 10, 1936); *National Discount Corp. v. O'Mell*, 194 F. 2d 452 (CCA 6, 1952). Consequently, the gravamen of the State Court Petition lies in contract and the claim asserted against each lessee defendant (and Warren and Oklahoma Natural as gas purchasers from such defendant) is separate and independent because it involved a separate lease contract (*Tillman v. Russo-Asiatic Bank*, 51 F. 2d 1023 (CCA 2, 1931), cert. den. 285 U. S. 539, 52 S. Ct. 312, 76 L. Ed. 932 (1932); Moore, *Commentary on the U. S. Judicial Code* (1949), p. 249) and a separate tract of land (*Pacific Railway Removal Cases*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319 (1885)).

4. The fact that Great Western did not execute the all-inclusive contracts executed by the other producers—and that the Petition so alleges—negatives Greenshields' general allegation in Paragraph 17 of his Petition that "the contract was a connivance, collusion, and confederation between the plant operators, Warren Petroleum Corporation and Oklahoma Natural Gas Company and all the lessee

tion in the conspiracy based on the execution of the original Gas Purchase Contracts by the other producers covering all gas produced from all zones and from all leases located in the four-township area.

Removal here is entirely in harmony rather than in conflict with *American Fire & Casualty Company v. Finn*, 341 U. S. 6 (1951). There this Court held that but a single wrong was alleged against three defendants. Here, two separate and distinct wrongs are alleged. The first resulted from the alleged execution of the all-inclusive Gas Purchase Contracts by all the producers except the Great Western companies; the second from the execution of the much more limited contracts by the Great Western companies, some two years later. Since diversity of citizenship exists concerning the second wrong, and the jurisdictional amount is present, the entire case was properly removed.

This same distinction removes any conflict between the Court of Appeals decision in our case and cases from other Courts of Appeals cited by Petitioners:

Mayflower Industries, Inc. v. Thor Corporation, 184 F. 2d 583 (CCA 3, 1950) cert. den. 341 U. S. 903, 71 S. Ct. 610, 95 L. Ed. 1342 (1951);

Edwards v. E. I. DuPont de Nemours & Company, 183 F. 2d 165 (CCA 5, 1950);

Bentley v. Halliburton Oil Well Cementing Company, 174 F. 2d 788 (CCA 5, 1949).

In each of these cases but a single wrong was alleged.

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defendants' who signed the agreement" (Pet. App. p. v). Consequently, the Court of Appeals rightly disregarded this general conclusion of law for the specific facts, affirmatively alleged respecting the Great Western companies, demonstrated that they had nothing to do with any such conspiracy. *Sewell v. J. E. Crosbie, Inc.*, 127 F. 2d 599 (CCA 8, 1942), cert. den. 317 U. S. 643, 65 S. Ct. 36, 87 L. Ed. 518 (1942); *Hamilton v. Empire Gas & Fuel Co.*, 297 Fed. 422 (CCA 8, 1924); *First National Bank of Greeley v. United States*, 86 F. 2d 938 (CCA 10, 1936); *National Discount Corp. v. O'Mell*, 194 F. 2d 452 (CCA 6, 1952).

Petitioners also cite authorities in support of the following propositions:

(a) Where a conspiracy is alleged to exist, each of the conspirators participating therein is jointly and severally liable for the acts of all other conspirators done in furtherance of the conspiracy;

(b) In a continuing conspiracy it is not necessary that the acts of all conspirators take place at the same time or that each conspirator personally participate in all of the misconduct;

(c) It is not necessary that each conspirator derive the same measure of benefit from the acts and benefits of the conspiracy or that he benefit at all from them;

(d) A petition alleging joint and several liability in tort against a number of defendants does not state a "separable controversy" under the old Removal Statute.

These are correct abstract propositions of law but they have no relevancy to the propriety of removal here. They assume the issue. The Court of Appeals here held that Greenshields' State Court Petition alleged *two separate wrongs* and that the wrong alleged against the Great Western companies was separate and independent from that involving the other producers. Consequently, the only question was whether the State Court Petition in fact alleged the existence of two separate wrongs, which we submit it did.

Conclusion.

The Opinion of the Court of Appeals holds that Greenshields' State Court Petition alleges a separate and independent claim or cause of action against the Great Western companies, Warren and Oklahoma Natural. The Opinion does not present such a conflict with the holding of this

Court in the *Finn* case, the decisions of other circuits, or the decisions of the Supreme Court of Oklahoma as to require this Court to exercise its supervisory powers. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November, 1957.